As for the period after 31 March 1988 the following further particulars of unspecified sum on interest were appended:

> Plus further interest thereon at the rate of 8% pa on the sum of $33,215 from 1 April 1988 to date of full realization or date of adjudicating and/or receiving orders.

According to the learned judge in his grounds of judgment, on the date when the creditor's petition was heard, he had allowed an application by counsel for the creditor to waive the claim for interest after 31 March 1988, thereby limiting the demand on payment of interest only up to that date.

In our view, any reasonable person reading the bankruptcy notice should be left in no doubt at all that the amount which the appellant had to pay to avoid the commission of an act of bankruptcy under s 3(1)(i) of the Bankruptcy Act 1967, was the quantified sum of $47,449.45. There was no room for dispute that on 8 June 1988, the said sum claimed in the body of the bankruptcy notice was capable of being made the subject of execution. The notice was clear and unequivocal. We were therefore unable to appreciate the argument of counsel for the appellant that the bankruptcy notice was bad in law. The fact that other information was given in the notice would not render the notice bad in law, so long as the amount demanded for payment within the seven days had been quantified and was unequivocal. We were of the view that even if the unspecified sum on further interest from 1 April 1988 had not been waived or abandoned by the judgment creditor, the bankruptcy notice would have remained valid, since the unspecified sum was never included in the amount claimed in the body of the bankruptcy notice.

Much had been said about the requirement that the amount quantified in the body of the notice must be the correct sum owing as at the date of the bankruptcy notice. The question in this appeal was, was a sum less than the amount that should be actually owing as at the date of the issue of the notice, an incorrect sum for the validity of the notice? Obviously not. It could be a lesser amount than the sum actually owing and capable of being made the subject of execution at the date of issue of the notice. In the present case, the quantified sum demanded for payment within seven days (up to 31 March 1988), though less than the amount actually owing on the date of issue of the bankruptcy notice (8 June 1988), was not a fatal defect. Where the date of issue of the notice by the registrar is the same as the date named in the notice by the creditor, which is the case here, then the maximum amount of interest accruing due that the judgment creditor could possibly quantify in the body of the bankruptcy notice was obviously the amount owing as at the date of issue of the notice. This is envisaged by this court in *Ghazali bin Mat Noor* v *Southern Bank Bhd & Ors*[2] at p 143. In our opinion, where it would be possible to quantify the interest due up to the date of the issue of the bankruptcy notice, the solicitors for the judgment creditor in the preparation of the notice, could claim for their clients the quantified maximum sum in advance. However, if they elected for some reason to claim for a lesser sum, or where it is not possible to quantify the maximum sum, it could not by itself render the bankruptcy notice bad in law for the simple reason that it could not possibly affect the correctness of the sum actually owing as at the date of issue of the bankruptcy notice. As far as interest on judgment debt is concerned, the correct sum owing as at the date of issue of the bankruptcy notice (which in the present case was the same as the date named in the notice) could therefore either be the maximum quantified sum or any lesser sum that existed at an earlier date as a judgment debt and available for bankruptcy purposes.

In the circumstances, the bankruptcy notice in this case was not bad in law merely because the quantified sum demanded in the body of the notice was as at 31 March 1988 and not as at the date of issue of the notice, on 8 June 1988. For reasons given above, we had dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *A Lingam & Co; Nik Hussain & Partners.*

Reported by *Prof Ahmad Ibrahim*

Geh Cheng Hooi & Ors v Equipment Dynamics Sdn Bhd and other appeals

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NOS 02-32 OF 1989, 02-33 OF 1989 AND 02-38 OF 1989
HARUN HASHIM, MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
21 NOVEMBER 1990

Trusts and Trustees — Creation of trust — Commercial relationship — Sale of goods by concessionaires or consignors in department store — Proceeds of sale received by department store — Whether trust created — Whether moneys can be traced — Stock in department store sold by liquidators — Whether proceeds of sale subject of trust — Distribution of moneys comprised in trust — Onus of proof

Trusts and Trustees — Express trust — Trust by operation of law — Commercial relationship — Whether trust can be imputed — Circumstances to be considered

In this case the Emporium Supermarket Group comprised 29 separate companies which were running a total of 60 operating outlets. All these outlets were in the business of either supermarket and/or department stores and some of them were also carrying out fast food businesses, restaurants, eateries and confectioneries. The business was carried out through concessionaire and consignor arrangements and also through ordinary supplies on the usual credit basis. Space was leased out in department stores and goods were displayed and sold there. The department stores were concerned with the collection of

the proceeds of sale and the moneys would be paid to the department stores' cash registers and the total amounts collected in respect of the concessionaire sales, less the rental and commission, were intended to be reimbursed to the concessionaires at fixed periods of time. Some of the subsequent arrangements entered into provided specifically that the department stores would hold the moneys collected from the sale of the concessionaires' or consignors' goods on trust for these concessionaires or consignors. Other agreements did not contain this express and specific clause.

The group had liquidity problems and eventually the 29 companies presented various winding-up petitions and applied for the appointment of provisional liquidators. The provisional liquidators found it necessary to carry on with the business of some of the outlets. In the case of some outlets the goods were sold and the proceeds realized while in the case of others they were treated as one unit and the assets of the outlet were sold to a company, Inview Sdn Bhd.

There were four applications before the High Court which were brought by the concessionaires and the consignors. The applications were heard together and it was agreed by the parties that the issues could be resolved by the court answering several questions set out in the statement of the case by the provisional liquidators.

The High Court judge held that there was no sale or delivery of the goods from the concessionaires and consignors to the Emporium Group or to any of its outlets. The concessionaires and consignors had a licence to use space in the outlets and it was only for convenience that payments made by third party customers were made to the cashiers of the licensors of the outlets concerned. The learned judge also held that money for the goods paid by a customer became trust money to be held in trust by the licensor. The money was also intended to be banked in a common fund and this did not have the effect of the money losing its character of being trust money. As such, it is traceable.

The provisional liquidators and the Emporium Group appealed.

Held, dismissing the appeals:

(1) Although a trust should not normally be imported into a commercial relationship, yet in cases such as those involved in these appeals the court could and should consider the facts to determine whether a fiduciary relationship existed. The court was satisfied and agreed with the learned trial judge that in the circumstances of these cases a trust can be implied even where the agreements themselves do not contain an express clause that the proceeds of sale would be held on trust, as it is clearly manifested in the agreements and the correspondence concerned that it was the intention of the parties that the Emporium or its outlets as licensors should, after deduction of the fees and commissions agreed to be paid to them, make over to the concessionaires or consignors all payments by third party customers.

(2) The learned judge was right in holding that the principle in *Re Hallet's Estate*[3] should be applied to these cases and the money found in the tills of the various outlets and in the bank accounts are the subject matter of a trust or several trusts in favour of the concessionaires and consignors who can therefore trace the money there as well as to the proceeds of the sale to Inview Sdn Bhd.

(3) The burden of proof in this case was on the liquidators to account for the money if they can and if they cannot do so the money belongs to the trust or trusts concerned.

(4) The court agreed with the learned judge that both the *Romalpa* case[1] and *Re Andrabell*[2] are distinguishable because in the cases concerned in these appeals there was no sale of the goods concerned or even delivery of the goods from the concessionaires and/or consignors who had licences to use space in the Emporium outlets to sell their goods through their own salespersons to third party customers.

[Bahasa Malaysia summary

Di dalam kes ini Kumpulan Emporium Supermarket terdiri daripada 29 syarikat berasingan yang menjalankan 60 tempat penjualan. Tempat-tempat penjualan itu menjalankan perniagaan supermarket atau department stor dan ada yang menjalankan perniagaan makanan pantas, restoran, tempat makan dan tempat kuih-muih. Perniagaan itu dijalankan melalui pemegang konsesi dan pembekal barang-barang dan juga melalui bekalan biasa atas asas kredit biasa. Tempat-tempat disewa di department stor dan barang-barang dipamerkan dan dijual di sana. Department stor itu terlibat dengan pengutipan bayaran jualan dan duit-duit itu akan dibayar di mesin pendaftar wang tunai (cash register) department stor itu dan jumlah yan diperolehi dari jualan itu selepas ditolak sewa dan komisyen akan dibayar kepada pemegang konsesi atau pembekal barang-barang itu dari masa ke semasa. Ada juga terdapat peraturan yang dibuat yang menyebutkan dengan jelas bahawa department stor itu akan memegang duit-duit yang diperolehi daripada jualan barang-barang pemegang konsesi atau pembekal barang sebagai amanah bagi pemegang konsesi atau pembekal barang itu. Ada pula terdapat perjanjian yang tidak mempunyai peruntukan yang nyata dan spesifik itu. Kumpulan itu telah menghadapi kekurangan wang dan akhirnya 29 syarikat itu telah mengemukakan petisyen untuk penggulungan dan memohon perlantikan likuidator sementara. Likuidator-likuidator sementara itu berpendapat bahawa perniagaan perlu diteruskan di beberapa tempat jualan. Di beberapa tempat barang-barang itu dijual dan hasilniaga diperolehi akan tetapi di tempat-tempat lain semuanya dikumpulkan sebagai satu dan asetnya dijual kepada sebuah syarikat, Inview Sdn Bhd. Terdapat empat permohonan di hadapan Mahkamah Tinggi oleh pemegang konsesi dan pembekal barang-barang dan keputusan di beri bagi pihak pemohon. Likuidator-likuidator membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Sungguhpun amanah biasanya tidak dimasuk-terima didalam perhubungan perniagaan, akan tetapi didalam kes-kes seperti yang terlibat didalam rayuan ini, mahkamah boleh dan hendaklah menimbangkan fakta-fakta kes itu untuk memutuskan sama ada perhubungan fiduciari telah wujud. Mahkamah berpuashati dan bersetuju dengan arif hakim yang membicarakan kes ini bahawa didalam keadaan kes-kes ini amanah boleh dianggapkan sungguhpun perjanjian-perjanjian itu tidak mengandungi syarat ternyata bahawa hasil jualan itu hendaklah dipegang sebagai amanah, oleh kerana telah jelas dari perjanjian-perjanjian itu dan surat-menyurat yang berkaitan bahawa niat pihak-pihak ialah Emporium dan tempat-tempat jualannya sebagai pemberi lesen hendaklah selepas memotong fee dan komisyen yang dipersetujui dibayar kepadanya, memberi kepada pemegang konsesi atau pembekal barang-barang itu semua bayaran yang diterima dari orang-orang yang membeli barang-barang itu.

(2) Hakim yang arif adalah tidak silap memutuskan bahawa prinsip didalam kes *Re Hallett's Estate*[3] hendaklah dipakai didalam kes-kes ini dan duit yang terdapat di dalam tempat duit di tempat-tempat jualan dan di dalam akaun bank adalah terlibat di dalam amanah atau amanah-amanah bagi pihak pemegang konsesi atau pembekal barang-barang, yang

mana berhak mengesan duit itu di sana dan juga dihasil jualan kepada Inview Sdn Bhd.

(3) Beban membukti di dalam kes ini adalah dipikul oleh likuidator menjelaskan duit-duit jika boleh dan jika ia tidak membuat demikian duit itu adalah terpulang kepada amanah atau amanah-amanah yang berkenaan.

(4) Mahkamah bersetuju dengan hakim yang arif bahawa kes-kes *Romalpa*[1] dan *Andrabell Ltd*[2] boleh dibezakan kerana didalam kes-kes yang terlibat didalam rayuan ini tidak terdapat penjualan barang-barang yang berkenaan atau pun penyerahan barang-barang itu oleh pemegang konsesi atau pembekal barang yang diberi lesen menggunakan tempat di Emporium untuk menjual barang-barang itu dengan menggunakan penjualnya sendiri kepada pembeli-pembeli pihak ketiga.]

Cases referred to

1 *Aluminium Industrie Vaassen BV* v *Romalpa Aluminium* [1976] 2 All ER 552 (distd)
2 *Re Andrabell* [1984] 3 All ER 407 (distd)
3 *Re Hallet's Estate* (1879) 13 Ch 696 (folld)
4 *Henry* v *Hammond* [1913] 2 KB 515 (refd)
5 *Hospital Products Ltd* v *United States Surgical Corp & Ors* (1984) 58 ALJR 587 (refd)
6 *Pine Pass Oil and Gas Ltd* v *Pacific Petroleums Ltd* 70 DLR 2nd Series 196 (refd)
7 *Maharaja Srish Chandra Nandy* v *Supravat Chandra* AIR 1960 Cal 337 (distd)
8 *Re Australian Home Finance Pty Ltd* [1956] VLR 1 (refd)
9 *Lyell* v *Kennedy* (1889) 14 AC 437 (refd)
10 *Re Kayford Ltd* [1975] 1 All ER 604 (refd)
11 *Re Tilley's Will Trusts* [1967] Ch 1179 (folld)
12 *Re Oatway* [1903] 2 Ch 356 (refd)

Appeal from: Originating Summons No D3-31-165-87, Companies WInding-Up Petition No D3-42-211-87 and Originating Summons No D3-31-162-87 (High Court, Kuala Lumpur)

Robert Lazar for the appellants.
Wong Chong Wah (Karina Merican with him) for the first, second and third respondents.
Narajan Singh for the fourth respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): These were appeals from cases which were heard together in the High Court at Kuala Lumpur by VC George J who approved an agreement by counsel that the issues raised in the petition in Companies Winding-Up No D3-42-211-87, Originating Summons No D3-162-87 and Originating Summons No D3-31-165-87 could be resolved by the court answering the several questions set out in the following 'Statement of the case by provisional liquidators':

1 The intention of this statement of case, which has been prepared with the approval of solicitors of several of the concessionaires and of that of the committee of inspection, is to provide the court with the factual background relating to the claims put forward by several concessionaires and consignors, and to state the questions for determination by the court.

2 There are four applications before this court for hearing on 1 and 2 December 1988 and they are:

(a) an originating summons by Wan Lee Brothers Sdn Bhd and Palmajaya Sdn Bhd in Originating Summons No D3-162-87;
(b) an originating summons by Equipment Dynamics Sdn Bhd in Originating Summons No D3-31-165-87;
(c) the notice of motion of the provisional liquidators in Companies Winding-Up No D3-42-211-87;
(d) a further notice of motion (enclosure) the same petition (sic).

3 The claims that fall for determination by the court can broadly be divided into two categories:

(i) that of 'concessionaires' which are the subject matter of applications (a), (b) and (c) above and the other,
(ii) that of 'consignors' which comprise application (d).
(iii) Even amongst the 'concessionaires' they can then be sub-divided into two sub-categories:

(a) those concessionaires who have formal agreements with the companies [application (a) above] and;
(b) those concessionaires who have agreements evidenced by letters [application (b)].

In the case of consignors, it appears that most of the agreements are evidenced by letters.

4 The basis of the claim of all the concessionaires and consignors are that they are not to be treated as ordinary unsecured creditors of the various companies within the Emporium Group but that they are in a special category altogether, ie that they are beneficiaries of a trust.

5 The factual background relating to this dispute arises in this manner. What is commonly known as the Emporium & Supermarket Group, of which Emporium & Supermarket Holdings Bhd was merely one company, comprised 29 separate legal entities, which are the subject matter of various winding-up petitions which came up for disposal on 7 December 1988, and these 29 companies were running a total of 60 operating outlets. All these outlets were in the business of either supermarkets and/or department stores and some of them were also carrying out fast-food business, restaurants, eateries and confectionaries.

6 At one time the Emporium Group was the largest chain of retail department stores in Malaysia. Some time in 1985 the group started experiencing cashflow problems and were unable to settle payments to their various suppliers within the usual 90-day credit period. Some of these suppliers being apprehensive as to their payments then entered into special arrangements with the Emporium Group, which are elaborated in the paragraphs below. It must be emphasized that besides the concessionaire and consignor arrangement there were a whole lot of ordinary suppliers who continued to trade with the Emporium Group on the usual credit basis. These ordinary suppliers and other trade creditors and the unsecured portions of financial assistance given by banks and other financial institutions form the bulk, in numbers and amounts, of the Emporium Group's creditors, as compared to the concessionaires and consignors.

7 In the case of some concessionaires, the initial arrangements, entered into in late 1985, was that the conces-

sionaire leased out a specific space within the department store itself where they would exhibit the goods. For this purpose, the concessionaire paid a rental deposit and had to pay rent to the department store for the use of the exclusive space accorded to them. The concessionaire was entitled to display the goods in a special and distinct counter. A commission was payable to the department store depending on the volume of sale. Any pilferage of these goods was to the account of the concessionaire who was also obliged to insure the goods and to provide their own sales staff to manage the counter. Therefore the supply, exhibition and sale of the goods would all be within the control of the concessionaire's employees.

8 The department store will only be concerned with the collection of the proceeds of the sale and the moneys would then be paid to the department store's cash registers and the total amounts collected in respect of the concessionaire's sales, less the rental and commission, were intended to be reimbursed to the concessionaire at fixed periods of time.

9 This method of reimbursement was not complied with by some of the department stores and by subsequent arrangement, in some cases, it was agreed that the outlet in question would bank in the proceeds of the sale of the concessionaire's goods into the concessionaire's bank accounts on the day following the sale of the goods.

10 One element with regard to some of the subsequent arrangements entered into with the concessionaires and consignors was that the various department stores held themselves out as holding whatever moneys that were collected from the sale of the concessionaire or consignor's goods on trust for these concessionaires/consignors. Other agreements did not contain this express and specific clause.

11 The group's liquidity problem, despite these subsequent arrangements which in the case of applications (a) and (b) were entered into in November 1986, never improved and in March 1987 the 29 companies presented various winding-up petitions and applied for the appointment of provisional liquidators.

12 Provisional liquidators were appointed on 10 March 1987 and as soon as they took over custody of the various outlets they noted the amount of cash that was in the tills, ie physically present within the store and also in the various bank accounts of the outlets.

13 Immediately it would become apparent that the actual cash that was held by the various companies could not meet the total claims of the various concessionaires/consignors. After 10 March 1987, the provisional liquidators then carried on with the business of some of the outlets. Of the stock belonging to concessionaires which were on site, all concessionaires were invited to take back the stock. Those who agreed to continue trading left their stock and the provisional liquidators paid these concessionaires on all subsequent sales. Those who did not wish to continue the relationship, removed their stock. Thus, of the very stock sold by provisional liquidators, the concessionaires had been paid for in full for those stock. It could, however, be surmised that those stock had been purchased with moneys that were the proceeds of the sale of earlier stocks belonging to concessionaires.

14 The stock at those outlets which were immediately rendered unviable were sold and the proceeds realized. With the other outlets which were viable, they were then treated as one unit and the assets of those outlets were sold to Inview Sdn Bhd in return for consideration of $20m. This consideration as set out in the agreement comprised an estimated sum of $9m attributed to stocks in the various outlets that were sold to Inview Sdn Bhd. Between the date of the agreement and the actual handover to Inview Sdn Bhd, the provisional liquidators were still running the stores.

15 Of the stock indicated above, as the concessionaires either had removed the stock or had been paid for it, at the time of the sale to Inview Sdn Bhd they were the property of the Emporium Group but subject to the surmise.

16 Arising from the facts set out above, the following questions arise for determination.

(A) (i) Whether a trust can be implied in those cases where the agreements do *not* contain an explicit agreement that the proceeds of sale will be held on trust.

(ii) Whether the cash found in the tills of the various outlets and in the bank accounts as at 10 March 1987 are the subject matter of a trust, or several trusts, in favour of concessionaires and consignors;
(a) who have such a 'trust clause'
(b) who do not have such a 'trust clause'

(iii) Whether the concessionaires and consignors can trace into the moneys of the cash tills of the various outlets and in the bank accounts as at 10 March 1987.

(iv) If there is a trust imputed in such and every case, whether such trust or trusts are void as a matter of public policy as its effect would be to cause assets owned by the companies at the commencement of liquidation to be dealt with otherwise than in accordance with s 264 of the Companies Act 1965.

(v) Whether such a trust or trusts are void by reason of s 293 of the Companies Act 1965 read together with s 53 of the Bankruptcy Act 1967, in the case of a trust or trusts executed or constituted after 6 September 1986.

(B) (i) Whether such concessionaires and consignors can trace the moneys into the general stock of the companies and subsequently into the proceeds of sale of such stocks.

(ii) On the assumption that the stock notionally valued at $9m which were sold by the provisional liquidators was purchased by moneys which were at one time the subject matter of trusts in favour of the concessionaires, whether those stock and consequently the proceeds of the sale to Inview Sdn Bhd, are also the subject matter of a trust in favour of concessionaires and consignors generally.

(iii) Whether such a trust or trusts constitute a charge or charges created by the companies on the property of the companies.

(iv) Whether such a trust or trusts in the form of a charge or charges are therefore invalid and unenforceable by reason of non-registration pursuant to s 108 of the Companies Act 1965.

(C) In the event of there being such trusts as how the moneys comprised therein ought to be distributed inter-se the various concessionaires and consignors.

(D) Whether the security deposits paid by the concessionaires are also the subject matters of a trust in favour of the concessionaires.

In his judgment, the learned judge referred to *Aluminium Industrie Vaassen BV* v *Romalpa Aluminium*[1] and *Re Andrabell*[2] which had been cited to him. He pointed out that in each of those cases there was a sale of the goods, with provisions in the contracts for the vendor to retain property in the goods until payment for them had been effected or until the purchaser in turn had sold the goods to third parties. His Lordship also pointed out that in *Romalpa*'s case[1] it was held on the facts that a fiduciary relationship existed between the vendor and the purchaser because the relationship of bailor and bailee existed and where the goods were sold by the purchaser to sub-purchasers before title in them had passed to the purchaser, he was deemed to be selling the goods to the sub-purchasers as agent of the vendor and as such there was also a fiduciary relationship and the agent was accountable for the proceeds of sale. It was therefore held that the plaintiffs in *Romalpa*'s case[1] were entitled to trace the proceeds of sale and to recover them in priority to the creditors. In *Andrabell*'s case[2] the learned judge noted that the court found that there was a bailor/bailee relationship but held that the terms of the relationship were peculiar to the parties in that case and were such that in fact no fiduciary relationship came into being.

VC George J however distinguished both *Romalpa*'s case[1] and *Andrabell*'s case[2] from the cases in these appeals and pointed out that there was no question of any sale of the goods in these cases, or even a delivery of the goods from the concessionaires and consignors to the Emporium Group or to any of its outlets. He noted that each of the concessionaires and consignors had a licence to use space in one or other of the Emporium outlets to sell their goods using their own salespersons, although in some cases the salespersons had to be recruited from the existing staff of the Emporium or its outlets but once recruited they became the staff of the concessionaires or consignors concerned.

The learned judge was also of the view that it was only for the convenience of the parties and for ensuring that the fees and commissions agreed to be paid to the Emporium or its outlets as licensors that it was provided that upon a sale having been effected by the salespersons of the concessionaires or consignors, as the case may be, payments by third party customers were made to the cashiers of the licensors of the outlets concerned. He found that there was no question of any relationship of vendor and purchaser or even that of bailor and bailee in these cases and that there was an undertaking by the licensors that payments by third party customers less the agreed fees and commissions would be made over to the concessionaires or consignors by an agreed time.

The learned judge also found as a fact that it was the intention of the parties in the Wan Lee Brothers Sdn Bhd agreement that the terms of the agreement would apply to each of the outlets as if it was each outlet that had entered into the agreement with the concessionaires and/or consignors concerned, because the circumstances showed that to be the position and the parties have acted on that basis.

Another view expressed by the learned judge was that there should be no difference between a case where there is an express trust clause and a situation where there is an implied trust clause. In each of the cases where there was no express trust clause, he found on the facts and circumstances as well as the conduct of the parties concerned that there was an implied trust clause. He noted that where there was an express trust clause it was conceded by counsel that there was a fiduciary relationship and he found that there was also such a relationship where there was only an implied trust clause. In his judgment in the cases concerned the moment a sale was effected and a customer paid for the goods, the property in such goods was transferred from the owner of the goods, namely, the concessionaires or consignors concerned directly to the customer. On payment for the goods by the customer to the licensor's cashier the money paid became trust money to be held in trust by the licensor who only had the right to deduct therefrom the agreed licence fees and commissions but who had an obligation to pay the balance within the agreed period of time, initially 30 days and later reduced to a shorter period, to the concessionaire or consignor concerned. It was pointed out by his Lordship that money was a fungible or replaceable by other money and was not meant to be kept in a separate till and was meant to be mixed with other money including money of the outlet concerned. It was intended to be banked in a common fund and did not have the effect of the money losing its character of being trust money. As such, it is traceable and if it or the mixed fund was used to buy chattels or land, the tracing exercise could be taken to those chattels or land as the case may be. Following *Re Hallett's Estate*[3] the learned judge held that the cash found in the bank accounts and in the tills being a smaller amount than was entrusted was therefore wholly trust money. As regards the balance of the trust money, he considered that there was no way in which it could be proved where the money has gone. He considered that it was a matter in the peculiar knowledge of the trustee only and as such it was for the trustee to account for the money and if the receivers have taken over from the

trustee it was for them to do so if they can. He therefore held that on a balance of probabilities those stock in trade of the Emporium group which the receivers found when they took over must have been purchased using mixed funds and it followed that the trust money could be traced to those goods.

The answers of the learned judge to the questions posed in the 'Statement of the case by provisional liquidators' above were as follows:

(A)(i) Yes.
(ii) Yes in respect of both (a) and (b).
(iii) Yes.

Having found there to be a fiduciary relationship between the parties in each case and having found that the moneys were held in trust, in my judgment, ss 264 and 293 of the Companies Act 1965 are not relevant.

The answers to the rest of the questions are as follows:

(A)(iv) No.
(v) No.

(B)(i) Yes.
(ii) Yes.
(iii) No.
(iv) No.

(C) On a pro rata basis but not on the global sum but on a company by company basis vis-a-vis the beneficiaries whose money is deemed to be in the mixed fund as cash in the tills or bank or in the stocks found at each outlet.

The answer to (D) is in the negative.

Before us Mr Lazar appearing for the appellants, contended that in those cases where there is no express trust clause, the law would not imply a trust relationship. He referred to the following passage in the judgment of Channell J in *Henry* v *Hammond*[4] at p 521 in which case it was held that a contract of agency does not in itself make the agent a trustee:

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor. All the authorities seem to me to be consistent with that statement of the law. I agree with the observation of Bramwell LJ in *New Zealand and Australian Land Co* v *Watson* (1881) 7 QBD 374 at 382 when he said that he would be very sorry to see the intricacies and doctrines connected with trusts introduced into commercial transactions.

Counsel therefore submitted that a trust should not be imported into a commercial relationship.

Mr Lazar then referred us to the following passages at pp 596 and 618 in the judgment of the High Court of Australia in *Hospital Products Ltd* v *United States Surgical Corp & Ors*:[5]

> I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations: see *Re Coomber; Coomber* v *Coomber* [1911] 1 Ch 723 at 728-729; *Jenyns* v *Public Curator* (Q) (1953) 90 CLR 113 at 132-133 and *Phipps* v *Boardman* at 126-127; and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose. For example, the relation of physician and patient, and priest and penitent, may be described as fiduciary when the question is whether there is a presumption of undue influence, but may be less likely to be relevant when an alleged conflict between duty and interest is in question. Moreover, different fiduciary relationships may entail different consequences, as is shown by the discussion of the respective positions of a trustee and a partner in relation to the renewal of a lease: see *Re Biss; Biss* v *Biss* [1903] 2 Ch 40 at 56-57 and 61-62 and *Griffith* v *Owen* [1907] 1 Ch 195 at 203-204. (Gibbs CJ).

and

> In commercial transactions of the kind here under consideration, where the parties are dealing at arm's length and there is no credible suggestion of undue influence, I am reluctant to import a fiduciary obligation. The courts have often expressed a cautionary note against the extension of equitable principles 'not to strain [them] beyond [their] due and proper limits', to use the words of Lord Selborne LC in *Barnes* v *Addy* (1874) 9 Ch App 244 at 251. In *New Zealand and Australian Land Co* v *Watson* (1881) 7 QBD 374 the Court of Appeal held that the defendants, who had effected sales of wheat consigned by the plaintiffs for sale, did not stand in any fiduciary character towards the plaintiffs so as to entitle the latter to follow the proceeds of their property in the defendant's hands. Bramwell LJ said, at p 382:
>
> > 'Now I do not desire to find fault with the various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions and an agent in a commercial sense turned into a trustee with all the troubles that attend that relation. I think there is no good ground for holding that these defendants have any fiduciary character towards the plaintiffs.'
>
> These observations remain as pertinent today as they were 100 years ago: *Scandinavian Trading Tanker Co AB* v *Flota Petrolera Ecuatoriana* [1983] 2 AC 694, per Lord Diplock at 703-704; cf (1984) 100 *Law Quarterly Review*, at 369-375. As the cases referred to by the Chief Justice in his judgment show, this court has refused, on several occasions, to find a fiduciary relationship in circumstances where the parties contract with each other freely and more or less on an equal footing in a commercial dealing: see *Jones* v *Bouffier* (1911) 12 CLR 579; *Dowsett* v *Reid* (1912) 15 CLR 695; *Para Wirra Gold & Bismuth Mining Syndicate NL* v *Mather* (1934) 51 CLR 582 (Wilson J).

Counsel stated that the parties in these cases had entered into commercial transactions and urged us not to find that a fiduciary relationship existed between them and submitted that there was no difference between a concessionaire and an ordinary supplier in these cases.

We were then referred to the agreement entered into between Emporium & Supermarkets Holdings Bhd and Wan Lee Brothers Sdn Bhd (p 231 of the appeal records) and counsel stated that that agreement only contained an express trust between them and contended that the trust relationship could only bind the contracting parties. He referred us to and relied on the following passage in the judgment of Ruttan J of the British Columbia Supreme Court at p 214 in *Pine Pass Oil and Gas Ltd* v *Pacific Petroleums Ltd*:[6]

> To maintain the continuing fiduciary relationship with a continuing duty to share and account, the plaintiffs must establish a trust status that extends beyond the express trust. I find in this case they have been unable to do so.

On the question of the burden of proof, Mr Lazar referred us to the judgment of the learned judge and stated that his Lordship had placed the burden of proof on the liquidators and not beneficiaries of the trust. He referred us to the following passage in the judgment of the Calcutta High Court in *Maharaja Srish Chandra Nandy* v *Supravat Chandra*[7] at p 345:

> But, when a suit is brought by the cestui que trust against the legal representative of a trustee, the burden is on the plaintiff. He will have to establish what was the surplus which was in the hands of his trustee.

Counsel therefore contended that the onus in these cases was not on the trustee and therefore not on the provisional liquidators.

Mr Wong Chong Wah, leading counsel for all the respondents except O'Taxs Enterprise, stated that the facts in these cases are different from those in *Andrabell's case*[2] and submitted that in the present case one must look at the relationship between the parties. As an example, he referred to the concessionaire agreement dated 22 November 1985 between Klasse Department Store Sdn Bhd and Equipment Dynamics Sdn Bhd (p 193 of the appeal records) and pointed out that the paragraph relating to sales collection provided that the store of Klasse Department Sdn Bhd would collect the sales of Equipment Dynamics Sdn Bhd through its cash register and reimburse the latter the following month after deductions of rental and commissions. He also referred to a letter from the concessionaire Equipment Dynamics Sdn Bhd to Klasse Department Store Sdn Bhd dated 8 January 1987 (p 215 of the appeal records) wherein the former had pointed out to the latter that the sales money was only kept by Klasse Department Store Sdn Bhd in trust for Equipment Dynamics Sdn Bhd.

On the agreement between Emporium and Supermarkets Holdings Bhd and Wan Lee Brothers Sdn Bhd, Mr Wong referred to the agreement itself and pointed out that the only difference was in section 6.26 of the agreement (p 240 of the appeal records) which provides that all payments made by customers in respect of goods sold by Wan Lee Brothers Sdn Bhd shall be paid directly to the cashiers employed by Emporium and Supermarkets Holdings Bhd and such payments shall be held by it in trust for Wan Lee Brothers Sdn Bhd. He then referred to the judgment of VC George J and pointed out that the learned judge saw no difference between an express trust clause and a situation where there is an implied trust clause. Council also referred to the Australian case of *Re Australian Home Finance Pty Ltd*[8] at p 9 in which the Supreme Court of Victoria applied *Lyell* v *Kennedy*[9] and referred to the following passage in the speech of the Earl of Selbourne in that latter case at p 457:

> A man who receives the money of another on his behalf, and places it specifically to an account with a banker earmarked and separate from his own moneys, though under his control, is in my opinion a trustee of the fund standing to the credit of that account. For the constitution of such a trust no express words are necessary; anything which may satisfy a Court of Equity that the money was received in a fiduciary character is enough. It is not requisite that any acknowledgment of such a trust should be made to the cestui que trust or his agent; to whomsoever made it is evidence against the trustee.

Mr Wong then referred to *Re Hallet's Estate*[3] in which case it was held, inter alia, that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hand. Counsel also referred to the judgment of Megarry J in *Re Kayford Ltd*[10] at p 607 in which case his Lordship had pointed out that it is well settled that a trust can be created without using the words 'trust' or 'confidence' or the like: the question is whether in substance a sufficient intention to create a trust has been manifested. His Lordship also said as follows:

> Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements.

Mr Wong also submitted that VC George J was right when he held that 'the considerations taken into account by Peter Gibson J in *Andrabell*[2] to distinguish that case from the *Romalpa* case[1] are not really relevant here where there was never intended to be a sale of the goods to the Emporium group or to any of the outlets in that group who were licensors of space to the concessionaires and/or to the consignors'.

Counsel also supported the learned judge's finding of fact that it was the intention between the parties in the Wan Lee Brothers agreement that the terms of the agreement would apply to each of the outlets as if it was the outlet that had entered into the said agreement with the concessionaires and/or consignors concerned.

On the question of the onus of the proof, Mr Wong referred to the following passage in the judgment of Ungoed Thomas J in *Re Tilley's Will Trusts*[11] at p 1183:

> If a trustee mixes trust assets with his own, the onus is on the trustee to distinguish the separate assets, and to the extent that he fails to do so they belong to the trust.

He also referred to *Re Oatway*[12] in which case it was held that where a trustee paid trust money into his banking account whereby it became mixed with his own money, and out of moneys drawn from the account purchased an investment in his own name, but subsequently applied the balance to his own purposes, his representatives cannot successfully maintain that the investment was purchased out of the trustee's own money, and that what has been spent, and can no longer be traced and recovered, was the money belonging to the trust.

Mr Naranjan Singh, counsel for O'Taxs Enterprise Sdn Bhd, merely repeated his submission made in the High Court. He also referred to para 6.1 of a letter dated 20 October 1986 from the executive director of Emporium & Supermarkets Holdings Bhd to O'Taxs Enterprise Sdn Bhd wherein it was stated that the cost of the products sold will be kept in trust by their company (p 189 F of the supplementary appeal record). Counsel stated that in his case there was an express trust. And in his reply Mr Lazar contended that the cases cited by Mr Wong were not applicable and that *Andrabell*'s case[2] applied in full force to these cases.

Trusts are either (i) express trusts, which are created expressly or impliedly by the actual terms of some instrument or declaration, or which by some enactment are expressly imposed on persons in relation to some property vested in them, whether or not they are already trustees of that property; or (ii) trusts arising by operation of law (other than express trust imposed by enactments) (see para 523 of 48 *Halsbury's Laws of England* (4th Ed)). Trusts arising by operation of law could be constructive and resulting trusts. Although we would agree with the view that a trust should not normally be imported into a commercial relationship, yet we would hold that in cases such as those involved in these appeals the court could and should consider the facts to determine whether a fiduciary relationship existed. We therefore agreed with Mr Wong that in the present cases we must consider the circumstances concerning the relationship between the parties. We were satisfied and agreed with the learned judge that in the circumstances of these cases a trust can be implied even where the agreements themselves do not contain an express clause that the proceeds of sale would be held on trust, as it is clearly manifested in the agreements and the correspondence concerned that it was the intention of the parties that the Emporium or its outlets as licensors should, after deduction of the fees and commissions agreed to be paid to them, make over to the concessionaires or consignors all payments by third party customers. We also agreed with the learned judge and Mr Wong that the principle in *Re Hallet's Estate*[3] should be applied to these cases and that the cash found in the tills of the various outlets and in the bank accounts as at 10 March 1987, are the subject matter of a trust or several trusts in favour of the concessionaires and consignors who can therefore trace the money there as well as to the proceeds of the sale to Inview Sdn Bhd.

As regards the contract between Emporium & Supermarkets Holdings Bhd and Wan Lee Brothers Sdn Bhd, having perused the appeal records and heard the submissions of counsel, we see no reason to disturb the finding of fact of the learned judge that the intention of the parties was that the terms of the agreement would apply to each of the outlets as if each outlet had entered into the agreement with the concessionaires and/or consignors concerned and that the circumstances of the case also show that to be the position and the parties have acted on that basis.

On the issue of the burden of proof, we considered that the passage in the judgment of the Calcutta High Court in *Maharaja Srish Chandra Nandy* v *Supravat Chandra*[7] is not applicable because it concerned a suit brought by a cestui que trust against the legal representative of a trustee. The Indian court held that the plaintiff must establish what was the surplus in the hands of the trustee who as defendant is under no obligation to explain or establish any item of account. We would prefer to accept and apply the ratio in *Re Tilley's Will Trusts*,[11] that if a trustee mixed trust assets with his own in such a way that they could not be sufficiently distinguished and treated separately, to the extent that he failed to distinguish them, the onus being on him to distinguish the separate assets, they belonged to the trust. In this case we therefore agreed that the burden of proof was on the liquidators to account for the money if they can and if they cannot do so the money belongs to the trust or trusts concerned.

We also agreed with the learned judge that both the *Romalpa* case[1] and *Re Andrabell*[2] are distinguishable because in the cases concerned in these appeals there was no sale of the goods concerned, or even delivery of the goods from the concessionaires and/or consignors, who had licences to use space in the Emporium outlets to sell their goods through their own salesperson to third party customers. We would also point out that although *Re Andrabell*[2] was a case concerned with the sale of goods, there the passing of property in the goods was postponed only until full payment made for a particular consignment rather than the total indebtedness. There was also no provision for the separate storage of goods as well as no obligation on the buyer to keep the proceeds from the sale of goods separate. Because of

those facts Peter Gibson J in the Chancery Division of the English High Court therefore distinguished the *Romalpa* case[1] and held that the seller's action in *Re Andrabell*[2] against the liquidator for recovery of the purchase price failed. As the facts in *Andrabell*'s case,[2] which involved the sale of goods, are different from the facts in these cases here we therefore considered that *Re Andrabell*[2] was not applicable.

Having considered the specific issues raised and argued before us, we therefore dismiss all these appeals for the reasons stated above. Counsel have not yet addressed us on the question of costs, but as costs normally follow the event, we would also order that the costs of these appeals in this court be paid by the appellants unless there are good reasons for us to reconvene to hear counsel again on the issue of costs only. The deposits would also be paid to the respondents on account of their costs.

Appeals dismissed.

Solicitors: *Shearn Delamore & Co; Skrine & Co; KN Singh.*

Reported by *Prof Ahmad Ibrahim*

Kelapa Sawit (Teluk Anson) Sdn Bhd v Yeoh Kim Leng & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 249 OF 1985
HARUN HASHIM, AJAIB SINGH AND JEMURI SERJAN SCJJ
2 NOVEMBER 1990

Companies and Corporations — Shares, allotment of — Private company — Resolutions of directors not agreed to by all the directors — Allotment of shares not agreed to at board meeting — Application to declare purported allotment of shares null and void — Power of court to validate — Companies Act 1965, ss 63, 100, 162 & 155

Companies and Corporations — Shares certificates — Validation by court — Exercise of court's discretion under s 63 of Companies Act 1965 — Whether just and equitable to validate — Companies Act 1965, s 63

Civil Procedure — Appeal — Question of fact — No evidence to support finding of fact

The appellant in this appeal is a limited company incorporated in Malaysia as a family company, the majority of whose shares are held by members of the families of two brothers, Yeoh Seow Hong and Yeoh Kheng Hooi. On 24 January 1977, a circular resolution was passed round for the signatures of the directors of the company. This resolution purportedly approved in consideration of $200 per share at a premium of $100 the allotment of 369 shares to Yeoh Kheng Hooi and the members of his family. This circular resolution was signed by the chairman of the company and by Yeoh Kheng Hooi and his son Dr Yeoh Kim Leng, the first respondent, who was also a director of the company. Five share certificates in respect of the 369 shares were signed by the chairman and Yeoh Kheng Hooi. On 15 September 1978, Yeoh Kim Pong on behalf of the company issued a writ averring that the directors' resolution alloting 369 shares to the respondents was null and void. The company prayed for:

(a) a declaration that the purported allotment of the 369 shares made to the defendants (respondents) was null and void;
(b) an order that the defendants and each of them deliver to the company the said shares certificates for cancellation.

In their defence the defendants (respondents) claimed, inter alia, that the allotment of the shares was valid and that the directors of the company had already agreed to the allotment of the shares and therefore the directors' resolution of 24 January 1977 was immaterial and irrelevant. They also counterclaimed, in the event the allotment of the shares was null and void, for an order validating their allegedly impugned shares on the basis of ss 63 and 355 of the Companies Act 1965 and also for an order to rectify the register of the members of the company under s 162 of the Companies Act 1965.

The learned trial judge dismissed the claim of the company but allowed the defendants-respondents' counterclaim and ordered the issue of shares to them be validated under s 63 of the Companies Act 1965 and that the register of the members of the company be rectified accordingly. The company appealed.

Held, allowing the company's appeal:

(1) The written resolution of 24 January 1977 in pursuance of which the 369 shares were purportedly allotted and issued to the respondents was invalid and ineffectual because of non-compliance with art 54 of the articles of association of the company which stipulates that a resolution in writing signed by all the directors shall be as valid and effectual as if it had been passed at a meeting of the directors duly constituted.

(2) On the evidence, the finding of the learned trial judge that the decision to issue 369 shares to Yeoh Kheng Hooi was made and approved at the company's board meeting held in Penang in December 1976 could not be sustained. In the result, the allotment and issue of the disputed shares to the respondents on this account was also invalid.

(3) Estoppel does not operate under the circumstances of this case in favour of the respondents and neither does s 100 of the Companies Act 1965 apply because the allotment of the shares and the affixation of the seal of the company were not acts of the company.

(4) There were no proper and valid grounds in this case for the exercise of the discretion of the court to validate the impugned shares certificates. There is nothing shown to render it just and equitable for the court to exercise its discretion under s 63 to validate the share certificates except perhaps the capitalization of indebtedness and its conversion into fully paid-up shares on both sides of the Yeoh family being the method by which shares were allotted to them in the past.

(5) It would appear in this case that the allotment of shares was agreed but the actual amount that was owed by the company was disputed and this was the subject of a civil suit. It would be proper to let justice take its own course and the litigating parties abide by the decision of the civil suit when it was finally disposed of.